

1 THE HONORABLE MARSHA J. PECHMAN
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON

9 MARK HOFFMAN, on behalf of himself and all
10 others similarly situated,

11 Plaintiff,

12 vs.

13 HEARING HELP EXPRESS, INC.,
14 TRIANGULAR MEDIA CORP.,
15 LEADCREATIONS.COM, LLC, LEWIS
LURIE, INTRICON, INC., and INTRICON
CORPORATION.

16 Defendants.

17 NO. 3:19-cv-05960-MJP

18 **THIRD AMENDED COMPLAINT—**
CLASS ACTION

19 **DEMAND FOR JURY TRIAL**

20 Mark Hoffman, individually and on behalf of others similarly situated, alleges the
21 following against Defendant Hearing Help Express, Inc., Leadcreations.com, LLC, Triangular
22 Media Corp., Lewis Lurie, IntriCon, Inc., and IntriCon Corporation.

23 **I. NATURE OF ACTION**

24 1. From at least May through September 2019, Mark Hoffman received
25 telemarketing calls on his cellular phone placed by or on behalf of Hearing Help Express, Inc.
26 seeking to sell their hearing aid products to him.

1 2. The calls were placed using an automatic telephone dialing system (“ATDS”) in
 2 violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”).

3 3. Triangular Media Corp. (which is owned and operated by Lewis Lurie) and
 4 related company, Leadcreations.com, initiated some of the telemarketing calls to Mr. Hoffman
 5 until June of 2019. Triangular and Leadcreations.com initiated these calls itself or through a
 6 call center that it retained to place the calls.

7 4. After receiving the calls from Triangular and Leadcreations.com, Mr. Hoffman
 8 received ATDS calls from Hearing Help Express, Inc. directly.

9 5. Mark Hoffman has not been a Hearing Help Express, Inc. customer at any time,
 10 and Mark Hoffman did not consent to receive calls from Hearing Help Express, Inc., Triangular
 11 Media Corp., Leadcreations.com, Lewis Lurie, or their agents. Mark Hoffman’s telephone
 12 number is listed on the Do Not Call registry maintained by the Federal Trade Commission and
 13 has been continuously listed there since August 21, 2009.

14 6. Plaintiff brings this class action for damages and other equitable and legal
 15 remedies resulting from Defendants’ violations of the TCPA.

16 **II. JURISDICTION AND VENUE**

17 7. This Court has original jurisdiction over Plaintiff’s TCPA claims pursuant to 28
 18 U.S.C. § 1331, because they present a federal question.

19 8. This Court has personal jurisdiction over Hearing Help Express, Inc., Triangular
 20 Media, Leadcreations.com, Mr. Lurie, IntriCon, Inc., and IntriCon Corporation because they
 21 initiated the calls to Plaintiff’s cellular phone. Plaintiff’s cellular phone uses a Washington area
 22 code and was, at all relevant times, located in Washington.

23 9. Venue is proper in this District under 28 U.S.C. § 1331(b) because a substantial
 24 part of the events and omissions giving rise to Plaintiff’s claims occurred in this District.

25 **III. PARTIES**

26 10. Plaintiff Mark Hoffman resides in Kitsap County, Washington.

1 11. Defendant Hearing Help Express, Inc. is an Illinois corporation with
2 headquarters in Dekalb, Illinois.

3 12. Defendant Leadcreations.com, LLC is a Florida limited liability company with
4 its principal place of business in Florida. Leadcreations.com engaged in telemarketing conduct
5 in this district for, or together with, Triangular Media in order to market Hearing Help products.

6 13. Defendant Triangular Media Corp. is a Florida corporation with its principal
7 place of business in Florida. Triangular engaged in telemarketing conduct in this district and
8 others throughout the nation in order to market Hearing Help products.

9 14. Defendant Lewis Lurie is the owner and operator of Triangular Media.

10 15. Under the TCPA, an individual such as Mr. Lurie, may be personally liable for
11 the acts alleged in this Complaint pursuant to 47 U.S.C. § 217 of the Communications Act,
12 which reads, *inter alia*:

13 [T]he act, omission, or failure of any officer, agent, or other person acting for or
14 employed by any common carrier or user, acting within the scope of his
employment, shall in every case be also deemed to be the act, omission, or failure
15 of such carrier or user *as well as of that person*.

16 See 47. U.S.C. § 217 (emphasis added).

17 16. Mr. Lurie personally participated in the actions complained of by (a) selecting
18 some of the phone numbers that would be called; (b) choosing any telemarketing call center
19 that it might have used; and (c) personally authorizing the telemarketing conduct of Triangular
20 Media.

21 17. Hearing Help Express, Inc. is wholly owned by Defendant IntriCon, Inc., a
22 Minnesota corporation. IntriCon, Inc. is wholly-owned by Defendant IntriCon Corporation, a
23 Pennsylvania corporation which is also a public company. Intricon, Inc. and IntriCon
24 Corporation are referenced collectively as “IntriCon.” IntriCon’s operations span the United
25 States, Asia and Europe.

IV. FACTUAL ALLEGATIONS

1 **A. Defendants made non-emergency calls to the cellular phones of Plaintiff and other**
 2 **consumers without their prior express written consent.**

3 18. Plaintiff's telephone number, (XXX) XXX-9916, is assigned to a cellular
 4 telephone service.

5 19. Plaintiff has not been a Hearing Help Express, Inc. customer or subscriber at any
 6 time and never consented to receive calls from Hearing Help Express, Inc., Leadcreations.com,
 7 Triangular Media, or Lewis Lurie.

8 20. In May and June of 2019, the Plaintiff received at least six telemarketing calls
 9 from Leadcreations.com, Triangular Media, or a call center they commissioned.

10 21. These calls occurred on May 21, 22, 23, 24 and June 4, 13, 2019.

11 22. All of the calls were made using the Caller ID (855) 255-8148.

12 23. During the call on June 13, 2019, Plaintiff was transferred and a prerecorded
 13 message played. The prerecorded message played a series of recorded questions. Plaintiff
 14 wanted to know who had been calling him so he answered the questions. At the end of the
 15 message, a prerecorded question asked him if he agreed to receive automated calls about
 16 hearing aids. The recording did not identify who would be calling him about hearing aids.
 17 Plaintiff answered "no," clearly indicating that he did not consent to receive calls.

18 24. On August 27, 2019, Hearing Help Express, Inc. called Plaintiff's cellular phone
 19 from the telephone number (630) 403-8617.

20 25. On August 29, 2019, Hearing Help Express, Inc. again called Plaintiff's cellular
 21 phone from the telephone number (630) 403-8617.

22 26. On September 4, 2019, Hearing Help Express, Inc. again called Plaintiff's
 23 cellular phone, this time from the telephone number (847) 748-0828.

24 27. The September 4, 2019 call that the Plaintiff received from Hearing Help
 25 Express, Inc. began with a pause.

1 28. During the calls that Plaintiff answered, an individual from Hearing Help
 2 Express, Inc. promoted its hearing aid services and offered to sell them to the Plaintiff.

3 29. Plaintiff was not interested and had not requested information regarding those
 4 products.

5 **B. Defendants Used an ATDS.**

6 30. During at least the June 13, 2019 call, Triangular Media, Leadcreations.com, or
 7 a call center they retained, called Plaintiff's cellular phone using an ATDS. Plaintiff noted a
 8 pause before being connected to the call, which is characteristic of a call placed by an ATDS.

9 31. Furthermore, Plaintiff called back the telephone number that called him during
 10 all of the calls, Caller ID (855) 255-8148, and received a message that stated, "The number you
 11 have dialed is not in service." This is also indicative that an ATDS is used, as the call was made
 12 using a "spoofed" (made up) Caller ID number.

13 32. During the September 4, 2019 call, Hearing Help Express, Inc. called Plaintiff's
 14 cellular phone using an ATDS. Plaintiff noted a pause before being connected to the call, which
 15 is characteristic of a call placed by an ATDS.

16 33. The scale of Hearing Help Express, Inc.'s business requires that it and its agents
 17 use a sophisticated dialing system capable of storing phone numbers and dialing them
 18 automatically, as well as delivering messages without requiring the involvement of human
 19 agents.

20 34. The equipment used to call Plaintiff and others not only had the capacity to store
 21 or produce telephone numbers to be called using a random or sequential number generator, but
 22 was programmed to sequentially or randomly access stored telephone numbers to automatically
 23 call such numbers for the calls that are the subject of this case. The equipment generated, and
 24 then stored, a sequence of telephone numbers for calling, and then automatically called those
 25 numbers. The calls were part of a campaign that made numerous phone calls in a short period
 26 of time without human intervention.

1 35. In August of 2019, a former employee left the following review of working at
 2 Hearing Health Express, Inc. on the website GlassDoor, entitled “Boiler room telemarketing for
 3 hearing aid sales”:

4 The outbound sales operation is run like a boiler room. Cheap leads are loaded into
 5 a dialer.... About 98% did not ask for information on hearing aids, so you spend
 6 most of your day wasting your time talking to people who don’t even have hearing
 loss.

7 See <https://www.glassdoor.com/Reviews/Hearing-Help-Express-Reviews-E2608089.htm> (Last
 8 Visited September 24, 2019).

9 **C. Hearing Help is Directly Liable for the Calls it Made Directly, and Vicariously
 10 Liable for Triangular Media and Leadcreation.com’s Calling Conduct.**

11 36. Hearing Help hired Leadcreations.com and Triangular Media to originate new
 12 business through telemarketing conduct.

13 37. Hearing Help accepted the benefits of Leadcreations.com and Triangular
 14 Media’s illegal telemarketing by accepting leads called illegally and then attempting to sell
 15 Hearing Help’s good and services to them.

16 38. Hearing Help also had absolute control over whether, and under what
 17 circumstances, it would accept a lead.

18 39. Hearing Help knew (or reasonably should have known) that Leadcreations.com
 19 and Triangular Media were violating the TCPA on its behalf and failed to take effective steps
 20 within its power to force Triangular to cease that conduct.

21 40. In fact, Leadcreations.com and Triangular Media have previously settled
 22 allegations that it violated the TCPA.

23 41. As a result, Hearing Help is vicariously liable for illegal calling practices
 24 conducted by Leadcreations.com, Triangular Media, and agents they retained to engage in
 25 illegal telemarketing.

1 42. Hearing Help is directly liable for calls Hearing Help made to leads for whom
 2 Hearing Help has no evidence of prior express written consent, whether those leads were
 3 provided by Triangular Media, Leadcreations.com, or any other lead provider Hearing Help
 4 retained.

5 **D. IntriCon is vicariously liable for Hearing Help's calling conduct.**

6 43. IntriCon purchased Hearing Help as part of its strategy "to focus more capital
 7 and resources in marketing and sales to expand its reach into the emerging value based hearing
 8 healthcare market" *See*

9 [https://www.sec.gov/Archives/edgar/data/88790/000089710118000246/intricon180635_10-](https://www.sec.gov/Archives/edgar/data/88790/000089710118000246/intricon180635_10-k.htm)
 10 [k.htm](https://www.sec.gov/Archives/edgar/data/88790/000089710118000246/intricon180635_10-k.htm) (2017 Form 10k).

11 44. Purchasing Hearing Help allowed IntriCon to shift from selling its products to
 12 manufacturers and distributors to "marketing and selling hearing aid devices directly to
 13 consumers through direct mail advertising, internet and a call center." *Id.*

14 45. As its wholly owned subsidiary, IntriCon had the right to manage Hearing
 15 Help's operations. Indeed, Hearing Help's former CEO reported directly to IntriCon's CEO.

16 46. For example, Hearing Help required IntriCon's permission to purchase 20 to 30
 17 computers as it expanded its number of employees, including agents who conducted Hearing
 18 Help's telesales through a cloud-based dialer.

19 47. IntriCon personnel visited Hearing Help's premises in person on a monthly basis
 20 to meet with Hearing Help's CEO and set forth the expectations IntriCon had for Hearing Help.

21 48. IntriCon also required Hearing Help to produce to IntriCon weekly cash flow
 22 reports and monthly profit and loss reports and balance sheets.

23 49. IntriCon's "ability to control the operations of Hearing Help Express and the
 24 likelihood that [IntriCon] bears the largest risk and reward of its financial results" led IntriCon
 25 to consolidate Hearing Help's financials with its own. *See* 2017 Form 10k.

1 50. Despite IntriCon's ability to control Hearing Help's operations, and its
 2 manifestation of that control as described above, IntriCon did nothing to ensure that the
 3 telemarketing calls designed to benefit IntriCon's bottom line complied with telemarketing
 4 laws.

5 51. Hearing Help reasonably interpreted IntriCon's words or conduct, including but
 6 not limited to its intent to increase profits through use of Hearing Help's call centers, as
 7 IntriCon's authorization to engage in telemarketing that would increase company profits, no
 8 matter the tactics used.

9 52. As a result, IntriCon is vicariously liable for illegal calling practices conducted
 10 by Hearing Help.

11 **E. Defendants' TCPA violations injured Plaintiff.**

12 53. During the relevant period, Plaintiff has carried his cellular phone with him at
 13 most times so that he can be available to family and friends.

14 54. Defendants' calls invaded Plaintiff's privacy and intruded upon his right to
 15 seclusion. The calls frustrated and upset Plaintiff by interrupting his daily life and wasting his
 16 time.

17 55. Defendants' calls intruded upon and occupied the capacity of Plaintiff's cellular
 18 phone and depleted the battery of Plaintiff's cellular phone. The calls temporarily seized and
 19 trespassed upon Plaintiff's use of his cellular phone, and caused him to divert attention away
 20 from other activities to address the calls.

21 **V. CLASS ACTION ALLEGATIONS**

22 56. Plaintiff brings this lawsuit under Federal Rules of Civil Procedure Rules 23(a),
 23 (b)(2), and (b)(3) as a representative of the following classes:
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1 Class 1:

2 All persons or entities within the United States who received, on
3 or after October 9, 2015, a non-emergency telephone call from or
4 on behalf of Leadcreations.com or Triangular Media Corp
5 promoting goods or services:

6 (i) to a cellular telephone number through the use of an automatic
7 telephone dialing system or an artificial or prerecorded voice; or

8 (ii) to a cellular or residential telephone number that has been
9 registered on the national Do Not Call Registry for at least 31 days
10 and who received more than one such call within any twelve-
11 month period.

12 Class 2:

13 All persons or entities within the United States who received, on
14 or after October 9, 2015, a non-emergency telephone call from or
15 on behalf of Hearing Help Express, Inc., promoting goods or
16 services:

17 (i) to a cellular telephone number through the use of an automatic
18 telephone dialing system or an artificial or prerecorded voice; or

19 (ii) to a cellular or residential telephone number that has been
20 registered on the national Do Not Call Registry for at least 31 days
21 and who received more than one such call within any twelve-
22 month period.

23 Plaintiff reserves the right to amend the class definition following an appropriate period of
24 discovery.

25 57. Excluded from the Classes are Defendants, their employees, agents and assigns,
26 and any members of the judiciary to whom this case is assigned, their respective court staff, and
27 Plaintiff's counsel.

28 58. Because auto-dialing equipment maintains records of each contact, members of
29 the above-defined Classes can be identified through Defendants' or their agents' records.

Numerosity

1 59. At the time of filing, Plaintiff does not know the exact number of members of
 2 the Classes. But the breadth of Hearing Help Express, Inc. operations indicates that Class
 3 Members likely number in the hundreds or thousands, and are geographically disbursed
 4 throughout the country.

5 60. The alleged size and geographic dispersal of the Classes makes joinder of all
 6 Class Members impracticable.

Commonality and Predominance

7 61. Common questions of law and fact exist with regard to each of the claims and
 8 predominate over questions affecting only individual Class members. Questions common to the
 9 Class include:

10 a. Whether Hearing Help's dialing system(s) constitute an ATDS under the
 11 TCPA;

12 b. Whether Leadcreations.com or Triangular Media's dialing system(s), or
 13 the dialing system(s) of call centers they retained, constitute an ATDS under the TCPA;

14 c. Whether Hearing Help used an ATDS to place non-emergency calls to
 15 the cellular telephones of Plaintiff and Class members without their prior express written
 16 consent;

17 a. Whether Leadcreations.com or Triangular Media used an ATDS to place
 18 non-emergency calls to the cellular telephones of Plaintiff and Class members without their
 19 prior express written consent;

20 b. Whether Defendants placed calls to numbers on the National Do Not
 21 Call Registry;

22 c. Whether Defendants' telephone calls were made knowingly or willfully;

23 d. Whether Hearing Help is vicariously liable for the conduct of
 24 Leadcreations.com or Triangular Media Corp.

- 1 e. Whether Leadcreations.com is vicariously liable for the conduct of call
2 centers it retained;
- 3 f. Whether Triangular Media is vicariously liable for the conduct of call
4 centers it retained;
- 5 g. Whether IntriCon is vicariously liable for the conduct of Hearing Help;
- 6 h. Whether Plaintiff and Class members were injured by receiving such
7 calls; and
- 8 i. Whether Defendants should be enjoined from engaging in such conduct
9 in the future.

10 Typicality

11 62. Plaintiff's claims are typical of the claims of the Classes, in that Plaintiff, like all
12 Class Members, has been injured by Defendants' uniform misconduct—the placement of calls
13 to telephones for non-emergency purposes without the prior written express consent of the
14 called parties.

15 Adequacy of Representation

16 63. Plaintiff will fairly and adequately protect the interests of the Classes and is
17 committed to the vigorous prosecution of this action. Plaintiff has retained counsel experienced
18 in class action litigation and matters involving TCPA violations.

19 Superiority

20 64. A class action is superior to other available methods for the fair and efficient
21 adjudication of this controversy. Because the amount of each individual claim is small relative
22 to the complexity of the litigation, and because of Defendants' financial resources, Class
23 members are unlikely to pursue legal redress individually for the violations detailed in this
24 complaint. Class-wide damages are essential to induce Defendants to comply with federal law.
25 Individualized litigation would significantly increase the delay and expense to all parties and to
26 the Court and would create the potential for inconsistent and contradictory rulings. By contrast,

1 a class action presents fewer management difficulties, allows claims to be heard which would
2 otherwise go unheard because of the expense of bringing individual lawsuits, and provides the
3 benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

4 **VI. FIRST CLAIM FOR RELIEF**

5 **Violation of § 227(b)(1) for calls made using
6 an ATDS or artificial/prerecorded voice**

7 65. Defendants violated 47 U.S.C. § 227(b)(1) by placing non-emergency calls,
8 either directly or through the actions of others, using an automatic telephone dialing system or
9 an artificial or prerecorded voice to cellular telephone numbers without the prior express
10 written consent of the called party.

11 **VII. SECOND CLAIM FOR RELIEF**

12 **Violation of § 227(c) for calls placed to numbers
13 listed on the Do Not Call Registry**

14 66. Defendants violated 47 U.S.C. § 227(c) by placing, either directly or through the
15 actions of others, more than one telephone solicitation call within a 12-month period to
16 telephone numbers that have been listed on the national Do Not Call Registry for at least 31
17 days.

18 **VIII. PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff, individually and on behalf of the Class defined above,
20 respectfully requests that this Court:

21 A. Determine that the claims alleged herein may be maintained as a class action
22 under Federal Rule of Civil Procedure 23, and issue an order certifying the Class defined above
23 and appointing Plaintiff as the Class representative;

24 B. Award \$500 in statutory damages for each and every call that Defendants
25 negligently placed in violation of 47 U.S.C. § 227(b)(1) of the TCPA;

C. Award \$1,500 in statutory damages for each and every call that Defendants willfully or knowingly placed in violation of 47 U.S.C. § 227(c)(5) of the TCPA;

D. Grant appropriate injunctive and declaratory relief, including, without limitation, an order requiring Defendants to implement measures to stop future violations of the TCPA; and

E. Grant such further relief as the Court deems proper.

IX. DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury.

RESPECTFULLY SUBMITTED AND DATED this 12th day of January, 2021.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Adrienne D. McEntee, WSBA #34061
Beth E. Terrell, WSBA #26759
Email: bterrell@terrellmarshall.com
Jennifer Rust Murray, WSBA #36983
Email: jmurray@terrellmarshall.com
Adrienne D. McEntee, WSBA #34061
Email: amcentee@terrellmarshall.com
Benjamin M. Drachler, WSBA #51021
Email: bdrachler@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603

Anthony I. Paronich, *Admitted Pro Hac Vice*
Email: anthony@paronichlaw.com
PARONICH LAW, P.C.
350 Lincoln Street, Suite 2400
Hingham, Massachusetts 02043
Telephone: (617) 485-0018
Facsimile: (508) 318-8100

Attorneys for Plaintiff and the Proposed Class